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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

PERLA OLIVIA BALLESTEROS, a married woman acting in her individual and separate capacity, Plaintiff/Appellant, v. UNITED AUTOMOBILE INSURANCE COMPANY, a corporation; UNITED AUTOMOBILE INSURANCE GROUP, a business entity; WENDE GARCIA, an individual, Defendants/Appellees.	2 CA-CV 2009-0114 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C-20092045

Honorable Paul Tang, Judge

AFFIRMED

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H O W A R D, Chief Judge.

¶1 Appellant Perla Ballesteros appeals from the trial court's order dismissing the complaint she had filed against appellees United Automobile Insurance Company, United Automobile Insurance Group, and Wende Garcia (collectively "UAI"), in which she had alleged a claim of intentional infliction of emotional distress. For the following reasons, we affirm the order granting UAI's motion to dismiss for failure to state a claim upon which relief could be granted.

Facts and Procedural History

¶2 "On appeal from a motion to dismiss, we consider the facts alleged in the complaint to be true, and we view them in a light most favorable to the plaintiff to determine whether the complaint states a valid claim for relief." *Mintz v. Bell Atlantic Sys. Leasing Int'l, Inc.*, 183 Ariz. 550, 552, 905 P.2d 559, 561 (App. 1995). Juan Preciado-Cuevas drove his vehicle into the back of Ballesteros's car, causing Ballesteros to collide with another vehicle. Ballesteros's neck, hand, wrist, and back were injured in the accident. At the time of the accident, Preciado-Cuevas was insured by UAI.

¶3 After the accident, Ballesteros was transported to a local emergency room where a doctor noted her complaints and recommended that she see her family doctor for follow-up care. Several days later, UAI sent a letter to Ballesteros stating that the company would be investigating her injuries and "look[ed] forward to resolving the matter in a prompt and equitable manner." UAI also called Ballesteros to discuss the extent of her injuries. Soon after, UAI offered to pay Ballesteros $500.00 and pay for

four weeks of chiropractic care if she would agree to abandon all claims arising out of the accident. Ballesteros rejected UAI's offer.

¶4 UAI then hired a company to conduct surveillance on Ballesteros and her family. During the surveillance, the company videotaped Ballesteros, her husband, and children outside of the family home and outside of a local insurance office. UAI made black and white photographs from the surveillance videotape and mailed them to Ballesteros at her home, together with a letter in which it offered her $250.00 to settle any claim against Preciado-Cuevas.

¶5 When Ballesteros received the photographs and the settlement offer, she claimed she had been "horrified" and had "thought that her children and her husband were somehow in immediate danger or imminent harm." She soon realized, however, that the photographs had been sent by UAI to support its contention that the offer was "'fair, just and reasonable.'" This realization made her worry that she would not be able to "get any kind of care because the insurance company was telling her that they wouldn't pay for it because they were sure she was faking her injuries." Ballesteros was eventually diagnosed with "post traumatic emotional distress" stemming from the letter and photographs.

¶6 Ballesteros filed a complaint against UAI for intentional infliction of emotional distress. UAI filed a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6), Ariz. R. Civ. P. The trial court granted the motion and dismissed the complaint, finding UAI's conduct was not outrageous, a required element of such a claim. Ballesteros appeals from that ruling.

Intentional Infliction of Emotional Distress

¶7 Ballesteros claims that the letter and photographs UAI sent her constituted "outrageous behavior that should not be tolerated in our community" and that the trial court therefore erred when it dismissed the complaint.[1] We review the trial court's dismissal of Ballesteros's complaint de novo. *See Phelps Dodge Corp. v. El Paso Corp.*, 213 Ariz. 400, ¶ 8, 142 P.3d 708, 710 (App. 2006).

¶8 In order to establish a claim of intentional infliction of emotional distress, Ballesteros was required to show that UAI's "acts were 'so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community.'" *Mintz*, 183 Ariz. at 554, 905 P.2d at 563, *quoting Cluff v. Farmers Ins. Exch.*, 10 Ariz. App. 560, 562, 460 P.2d 666, 668 (1969), *overruled on other grounds by Godbehere v. Phoenix Newspapers, Inc.*, 162 Ariz. 335, 783 P.2d 781 (1989). Generally, the facts must be such that their "recitation . . . to an average member of the community would arouse his resentment against the actor, and lead him to exclaim 'Outrageous!'" *Cluff*, 10 Ariz. App. at 562, 460 P.2d at 668. UAI's conduct does not satisfy this standard.

[1]Ballesteros also claims that the trial court erred in dismissing her claim because the court "relied almost totally" on whether UAI had apparent authority over Ballesteros. But the trial court specifically concluded it was granting UAI's motion to dismiss because "the Plaintiff's Complaint does not meet the standard for 'outrageous conduct.'" Although the court also briefly mentioned that it was "not persuaded as to [Ballesteros's] theory that [UAI] had an 'apparent authority' relationship with her," any reliance the trial court placed on the concept of "apparent authority" was not its basis for dismissing the claim. Moreover, to the extent Ballesteros may have attempted to raise apparent authority as a basis for reversing the trial court, we find no facts in the complaint showing UAI had apparent authority over Ballesteros.

¶9 That UAI conducted surveillance on Ballesteros and sent her a letter with still images from that surveillance might be subject to criticism but is not outrageous, indecent, atrocious or intolerable. And, we are not required to accept Ballesteros's conclusions about the facts. *See Cullen v. Auto-Owners, Ins.*, 218 Ariz. 417, ¶ 7, 189 P.3d 344, 346 (2008) (conclusory statements "insufficient to state a claim upon which relief can be granted"); *Cluff*, 10 Ariz. App. at 562, 460 P.2d at 668.

¶10 Moreover, UAI sent Ballesteros the letter and photographs for the legitimate and permissible business purpose of attempting to settle any potential claims for bodily injury stemming from her accident.[2] *See Mintz*, 183 Ariz. at 554-55, 905 P.2d at 563-64 (court may consider whether defendant's actions done for legitimate business purpose when determining if they constituted outrageous conduct). Although Ballesteros claims that UAI sent her the surveillance photographs in an attempt to force her to settle her case, as UAI notes, an "actor is never liable . . . [for intentional infliction of emotional distress] where he has done no more than to insist upon his legal rights in a permissible way, even [if] he is well aware that such insistence is certain to cause emotional distress." *Pankratz v. Willis*, 155 Ariz. 8, 21-22, 744 P.2d 1182, 1195-96 (App. 1987) (finding no intentional infliction of emotional distress where husband conducted surveillance of wife during divorce proceedings), *quoting* Restatement (Second) of Torts § 46 cmt. g. "[T]he

[2]Ballesteros contends that UAI's correspondence was "not for a 'legitimate' business purpose but rather as a part of [UAI's] scheme to mislead [Ballesteros] into incorrectly believing that the surveillance was strong or conclusive evidence that her injuries would not be believed later." Although we must consider the facts alleged in Ballesteros's complaint to be true, *see Mintz*, 183 Ariz. at 552, 905 P.2d at 561, we need not accept her characterization of the facts.

act of an insurance adjuster in simply contacting a person to whom his company may be liable in order to obtain a settlement of that claim . . . does not [i]n and of itself, amount to extreme or outrageous conduct." *Cluff*, 10 Ariz. App. at 562, 460 P.2d at 668.

¶11 Ballesteros contends, however, that UAI's letter was not merely an attempt to contact her so that the claim could be settled, but that it was the kind of "aggravated conduct" the court in *Cluff* viewed as a potential basis for a claim of intentional infliction of emotional distress. *See id.* at 563, 460 P.2d at 669. But UAI's conduct here was far less outrageous than that of the insurance adjuster in *Cluff*, who had threatened and cajoled the claimant, even after she had retained an attorney. *Id.* at 562, 460 P.2d at 668. And this court affirmed the trial court's dismissal of the complaint in that case. *Id.* at 563, 460 P.2d at 669.

¶12 Ballesteros also compares her case to *Interstate Life and Accident Co. v. Brewer*, 56 Ga. App. 599, 193 S.E. 458 (1937), which the court cited in *Cluff*. In *Interstate Life*, the insurance adjustor contacted the plaintiff to discuss her coverage under the policy; the plaintiff was sick and in bed at the time, recovering from a heart attack. *Id*. at 599, 193 S.E. at 460. The adjuster threw a handful of coins in the plaintiff's face, and yelled "You don't need a doctor, you ought to die!" *Id*. The court in *Cluff* characterized the adjustor's conduct in *Interstate Life* as "aggravated" and agreed that the insurance company was liable for his behavior. 10 Ariz. App. at 563, 460 P.2d at 669. UAI's conduct, however, is not comparable to that of the insurance adjustor in *Interstate Life*. UAI merely sent Ballesteros a letter with photographs; it did not throw anything at her, shout at her, or wish her dead. UAI's correspondence, even if arguably inappropriate

in its inclusion of surveillance photographs, was not beyond the bounds of decency, aggravated, or outrageous.[3] *See Nelson v. Phoenix Resort Corp.*, 181 Ariz. 188, 199, 888 P.2d 1375, 1386 (App. 1994) (unjustifiable conduct not necessarily "beyond all possible bounds of decency" causing member of community to find it outrageous), *quoting Ford v. Revlon, Inc.*, 153 Ariz. 38, 43, 734 P.2d 580, 585 (1987). The trial court did not err in dismissing Ballesteros's complaint.

Conclusion

¶13 We affirm the trial court's dismissal of Ballesteros's claim.

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

PHILIP G. ESPINOSA, Presiding Judge

PETER J. ECKERSTROM, Judge

[3]Because this case is controlled by Arizona law, we need not analyze the foreign law Ballesteros cites.